IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1104 OF 2007
IN
SUIT NO. 810 OF 2007

Abhay Jayantilal Shah ..Plaintiff

versus

Ketan Jayantilal Shah & Ors. ..Defendants

Mr. Shailesh Shah with Mr. Swapnil Bangur i/b. Mr. Ashok Purohit for the Plaintiff.

Mr. Paritosh Jaiswal with Mr. Ashutosh Gavnekar with Mr. C. D. Patel i/b. M/s. Kanga & Co. for the Defendant Nos. 6 to 19.

CORAM : S. J. VAZIFDAR, J.

DATE : 13TH SEPTEMBER, 2007

P.C.

1. The suit is filed inter alia for a declaration that eight properties mentioned in Exhibit 'K' to the plaint belong to the branches of one Dhanraj Khimchand Shah, Kasturchand Shah and Gulabchand Shah with each branch being entitled to a share and interest therein. The Plaintiff has also sought partition by metes and bounds of the said properties and any other properties which may be

found to belong to the branches of the said three persons. Further, the Plaintiff has sought an order of disclosure and accounts.

2. The Plaintiff’s case is that the said Dhanraj, Kasturchand and Gulabchand Shah were the sons of one Khimchand Shah. Khimchand pre-deceased his three sons. The three sons expired on 3.1.1957, 24.12.1975 and in the year 1952 respectively. Dhanraj left behind him two sons. Kasturchand left behind a daughter and Gulabchand also left behind a daughter - Shantaben. Shantaben had six children, one of whom was Jayantilal, who is the Plaintiffs father.

. The Defendants are the heirs of the various branches of the said three sons.

3. The plaintiff’s case is that prior to 1947, Gulabchand carried on business jointly with Dhanraj and Kasturchand under the firm name and style of "Dhanraj Khimchand Shah"; that the firm was so named, as Dhanraj was the eldest brother; each of the three brothers had a one third interest in the business; the three brothers invested the surplus

profits into various properties from time to time on a co-ownership basis and that the properties were purchased from the common funds belonging to the joint business of the three brothers. The properties were purchased in the name of Dhanraj Khimchand Shah only for convenience, but the same were for the common benefit and ownership of all the bothers as co-owners thereof.

4. It is the Plaintiff’s case that in 1948 some of these properties were distributed among the brothers while the remaining properties continued in the co-ownership of the three brothers.

. Upon the death of Dhanraj Kevalchand Dhanraj Shah was managing the affairs of the business as well as the properties jointly owned by the brothers. Upon the death of Kasturchand Khimchand Shah and Kevalchand Dhanraj Shah all the affairs relating to the said properties, which allegedly continued to be held by them as co-owners were entrusted to one member from each branch, who would represent and act on behalf of all the branches of the entire family. Accordingly, the Plaintiff’s father, Jayantilal from the Gulabchand Branch was

nominated to manage the affairs relating to all the properties of the family jointly held. The Plaintiff contends that upon the death of Jayantilal, he continued to have an interest in the properties which were not subject to partition in 1948.

5. Mr Jaiswal, the learned counsel appearing on behalf of Defendant Nos. 6 to 19 raised a preliminary objection. He contended that the Plaintiff's father, Jayantilal had himself filed an identical suit being Suit No. 206 of 2004 in this Court. Interim proceedings were adopted by Jayantilal but due to a series of defaults, the same came to be dismissed. According to him that suit has abated. He submits that as the Plaintiff claims through Jayantilal and as the suit filed by Jayantilal has abated, the present suit is not maintainable.

. It is not necessary for me to consider this contention in view of the findings on merits itself.

6. Mr. Shah, the learned counsel appearing on behalf of the Plaintiff, firstly, he relied upon the

Deed of Partition dated 1.11.1948. The original Deed of Partition is in Gujarati, translations whereof have been provided by the parties. According to Mr. Shah the first two pages of the Deed of Partition are missing in the translation annexed to the affidavit in reply. He has produced the original document in Court. I will proceed on the basis that the Deed of Partition included the first few pages annexed by the Plaintiff as forming a part of the Deed of Partition.

7. Mr. Shah relied upon a portion of the Deed of Partition which I would prefer to quote in view of the nature of the translation. It reads as under:-

> "And original family's means Sha. Khimchand Bhaichandji's family's some properties were joint with others therefore ad other properties can not be distributed due to that three properties were not kept of joint family therefore according to beneficiaries' right parts were kept and was kept joint such agreement was done and its agreement is done separately. In this way on terms of joint family immovable movable properties were distributed to beneficiaries. Therefore now Sha. Khimchandji Bhaichandji's family joint Hindu Family and other two sub-families are not in existence now."

Mr. Shah placed considerable reliance upon the reference to three properties, which did not form the subject matter of the partition. He placed reliance on the fact that the above words indicate that in respect of the said three properties, a separate agreement was prepared.

8. I do not find any force in this contention. Firstly, it must be noted that the Deed of Partition refers to three properties. The Plaintiff in Exhibit 'K' has referred to eight properties. There in nothing in the Deed which identifies the properties. The separate agreement referred to in respect of the said three properties has not been produced.

Further, the subsequent part makes it clear that the Deed of Partition dealt with all the immovable properties of the HUF as existing on that day. It reads thus:-

> "Therefore, by making settlement amongst ourselves, the immovable properties of Hindu Undivided Family, which are existing today, are divided into three parts, wherein it is decided to give additional two houses to Bhai Dhanraj. Today we made list of all the properties and negotiated amongst ourselves

> and then the immovable properties are divided into three parts as follows:-"

9. Mr. Shah relied upon a Power of Attorney dated 28.2.2001 and in particular to the following portion:

> "The properties mentioned in the Schedule hereunder written are of our joint ownership and in our joint occupation and possession. We are desirous of selling these properties for our donafide family compulsions, this purpose, for our convenience, we have appointed our well Shri Jayantilal Gulabchand Shah as our Attorney to do the following acts, deeds and things." (emphasis supplied)

While describing the Andheri property which is one of the said properties, the Power of Attorney recites as follows:-

> "These properties are in the names of Shri Dhanraj Khimchand Shah and Harnaraingh Ramesumersingh Thakur. Out of these properties, the properties coming to the share of Dhanraj Khimchand Shah and the buildings constructed thereon are of the ownership of the joint family ownership property of the Dhanraj Khimchandji ni Pedhi's."

10. According to Mr. Shah in view of the

aforesaid Andheri property and the other properties referred to in the Power of Attorney are held jointly by the various members of the families of the said three sons. I do not agree. Firstly, what is stated is that the properties mentioned in the schedule to the Power of Attorney are "all our joint ownership and in our joint occupation and possession". The power of Attorney has been executed not by the Plaintiff but in favour of the Plaintiff. The term "our" therefore clearly does not refer to the Plaintiff. Nor does the power of Attorney refer to any member from the branch of Gulabchand. Further, the Plaintiff's father is the donee of the Power of Attorney and he is described therein as a well-wisher. If it were otherwise, surely, the Power of Attorney would have recited the fact that he is one of the joint owners.

11. It is also pertinent to note that the second portion extracted by me indicates that the Andheri property was held in the name of Dhanraj and one H. R. Thakur. There is no explanation from the Plaintiff regarding the nature of the holding in respect of this property by Dhanraj and by the said Thakur.

12. Mr. Shah relied upon the fact that it is stated in the Power of Attorney that the property is of the joint ownership of Dhanraj’s Pedhi. "Pedhi" is a Gujarati term which he submitted means a "firm". Thus he submitted, the property belongs to the family jointly.

13. The Defendants contention is that the Power of Attorney was executed blindly in view of the faith that the members of the family had in Jayantilal. He submitted that the word "Pedhi" was not there in the other Powers of Attorney, which I shall refer to. I will however for the present presume against the Defendants in this regard.

14. Even so I am of the view that this Power of Attorney does not establish the Plaintiff’s case at all. The Plaintiffs approach is to rely upon stray words and sentences in documents in isolation removed from the context to establish his case. Relying upon stray words and sentences, the court is invited to indulge in an exercise of conjecture and then conclude what the effect thereof would be. The approach is erroneous. The Plaintiff has not

established anything about the "Pedhi", or about the nature of the joint ownership with the said Thakur. It is the Plaintiff who claims that the property is jointly held by various members of the family. It is for the Plaintiff therefore in the first instance to prove and establish the same. The Power of Attorney certainly does not establish the Plaintiff's case.

15. There is an aspect in this regard of considerable significance. The use of the term "Pedhi" does not by itself conclude the matter. It requires explanation as to the circumstances in which it was used and the details of the alleged firm. Jayantilal could have furnished these details. In fact he ought to have furnished the same. He did not do so in his suit. I see no reason or justification for conjecture in these circumstances. Moreover, there is no explanation by Jayantilal in his suit as to why there is no reference to his alleged rights in the Power of Attorney.

16. Prior to the said Power of Attorney, a Power of Attorney dated 15.10.1994 was executed inter alia

by a member of the Dhanraj group. Here again the donee / Attorney is the Plaintiff's father Jayantilal. There is no reference to Jayantilal or any of the members of his family having any interest in the said property. While describing the property in this Power of Attorney, as rightly pointed out by Mr. Jaiswal, it is stated that the same stands in the name of Dhanraj and the said Thakur. There is no reference to the property belonging to Dhanraj's Pedhis.

17. This makes the necessity for a cogent explanation for the use of term "Pedhi" in the earlier Power of Attorney even more important.

18. In the circumstances, the above powers of Attorney not only do not support the Plaintiff's case but militate against it.

19. Mr. Shah then relied upon the income tax returns for the assessment years 1964-65, 1965-66 and 1967-68. The name of the assessee in the Returns is M/s. Dhanraj Khimchand & Harnarayan Rameshwar. The status is mentioned as AOP (Association of Persons). The returns state that

the assessment is under Section 143(3) of the Income Tax Act and that the income is divided amongst the "co-parceners". The returns further state that the total income is allocated amongst eight "partners" mentioned therein. Mr. Shah was unable to explain why there is a reference to coparceners on the one hand and partners on the other. He was unable to explain who the members of coparcenery were. He was unable to explain the reference to partners. Further, the names of eight persons are mentioned. If the Plaintiff's case is correct, viz. that all the members of all three branches jointly held the property, there is no explanation why all their names are not mentioned in the returns. Prima-facie, at least, it would indicate that the holding, even presuming there is any, was not as contended by the Plaintiff.

20. Further, Jayantilal's name finds place as a partner. These very documents were annexed by Jayantilal to his suit. There is no explanation by him in regard to the returns either. Jayantilal expired in the year 2006. Till then neither in the suit nor in any of the affidavits filed by him did he seek to throw any light on the subject. In the

circumstances, the Plaintiffs reliance on the Income Tax Returns is of no substance.

The least, that must be stated in favour of the Defendant is that the Income Tax Returns do not establish the Plaintiff’s case.

21. Mr. Jaiswal on the other hand relied upon the Deed of Conveyance dated 20.3.1946 which indicates that the Andheri property, for instance, had been bought by Dhanraj in his individual capacity.

22. Mr. Jaiswal also placed reliance with considerable force on the fact that a Writ Petition was filed only by the members of Dhanraj’s family. What is important is that the Writ Petition was filed by the Plaintiff’s father - Jayantilal as a Constituted Attorney of the Petitioners therein. Nowhere in the Writ Petition did he allege having any right in respect of the property. In paragraph 1 of the Writ Petition, it is stated by Jayantilal that the Petitioners had executed a Power of Attorney in his favour for looking after and administering the said properties. In paragraph 3.1

it is admitted that the property was purchased by Kevalchand Dhanraj i.e. Dhanraj's son, in Vapi. This property is mentioned at Sr. No. 4 of Exhibit 'K'. This entire Writ Petition belies the Petitioners case.

23. This Writ petition is referred to in paragraph 11-D of the Affidavit in Reply. The Petitioner has specifically contended to the above effect. It is important to note that there is no Affidavit in Rejoinder filed by the Plaintiff. There is no explanation by the Plaintiff for the same. The mere fact that Mr. Shah proceeded on the basis of denials is of no assistance in this regard.

24. In the circumstances, although I have not decided the preliminary objection regarding the maintainability of the suit, I cannot loose sight of the fact that the Plaintiffs father had filed the said Suit No. 206 of 2004 on 22.12.2003. For almost four years, no effective steps had been taken for obtaining any interim reliefs. The orders passed in the said suit and especially an order dated 31.1.2006 in Notice of Motion No. 239 of 2006 in the said suit indicate that even the Plaintiff's

father had not taken the matter seriously.

25. In the circumstances, the Notice of Motion is dismissed.